No. 80-901

MAR 13 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

DOUGLAS DEWEY AND WAUKESHA LIME AND
STONE COMPANY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

JOINT APPENDIX

JURISDICTIONAL STATEMENT DOCKETED
December 4, 1980
PROBABLE JURISDICTION NOTED January 26, 1981

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Relevant Docket Entries

Plaintiffs: Secretary of Labor

Defendants: DEWEY, DOUGLAS and WAUKESHA LIME & STONE CO., Waukesha, WI

DATE	NR.	PROCEEDINGS
2/16/79	1	Complaint filed; summons issued.
2/16/79	2	Motion for Preliminary Injunction
2/16/79	3	Brief in support of motion for preliminary injunction.
2/23/79	4	Notice of retaining Miller & Niebler, S.C. as attorneys for defendants.
2/22/79	5	Marshal's return of service of S&C; deft. Douglas Dewey served 2/20/79.
3/2/79	6	Answer and affirmative defense of defendants.
3/2/79	7	Deft's answering brief.
3/7/79	8	Affidavit of Walter C. Brey, Mine Safety and Health Administration, U.S. Dept. of Labor.
3/9/79	9	Stipulation that Mr. Brey was refused permission to conduct inspection without valid search warrant.
3/9/79	10	Hearing on mot. for prel. inj. motion denied, respondent to prepare order.
3/29/79	11	Memorandum and order denying both partes' motion for summary judgment.
4/12/79	12	Pltf's motion for reconsideration of order of 3/29/79, denying the pltf's motion for preliminary injunction with exhibits.
4/19/79	13	Defts' answering brief to motion for reconsideration.
4/20/79	14	Affidavit of James Harris, dust plant foreman at Waukesha Lime & Stone.
5/30/79	15	Memorandum and order (RWW) denying pltf's motion for a preliminary injunction,
5/31/79	16	Status report (RWW); further status report on 10/26/79.
8/3/79	17	Pltf's notice to take deposition of Walter A. Bechthold on 8/8/79 in Milwaukee, with request for production.
8/3/79	18	Pltf's notice to take deposition of Edward Bull on 8/7/79 in Milwaukee, WI, with request for production.
8/3/79	19	Pltf's notice to take deposition of Jack Delany on

DATE	NR.	PROCEEDINGS
		8/7/79 in Milwaukee, WI, with request for production.
8/3/79	20	Pltf's notice to take deposition of Douglas Dewey on 8/8/79 in Milwaukee, WI, with request for production.
8/6/79	21	Stipulation and order (RWW) substituting Francis R. Croak as atty for defts.
8/30/79	22	Deposition of Walter A. Bechthold taken on 8/8/79.
8/30/79	23	Deposition of Edward H. Bull taken on 8/7/79.
8/30/79	24	Deposition of Jack E. Delaney taken on 8/7/79.
8/30/79	25	Deposition of Douglas E. Dewey taken on 8/8/79.
10/16/79	26	Pltf's motion for summary judgment with supporting brief.
10/31/79	27	Defts' brief in opposition to motion for summary judgment with affidavit of Douglas Dewey.
11/15/79	28	Pltf's reply to defts' brief in opposition to motion for summary judgment.
7/10/80	29	Memorandum and order (RWW) denying pltf's motion for summary judgment and granting defts' motion for summary judgment; further ordered that the Federal Mine Safety & Health Act of 1977, in so far as they allow warrantless searches of stone quarries, is unconstitutional and thus unenforceable.
7/15/80	30	Judgment entered pursuant to above memorandum and order; copies mailed to the parties
7/22/80	31	Amended judgment approved by Judge Warren; copies mailed to the parties.
7/25/80	32	Pltf's motion to alter or amend judgment and to stay judgment.
7/30/80	33	Pltf's motion to alter or amend judgment and to stay judgment.
8/6/80	34	Defts' brief in opposition to motion to alter or amend judgment and to stay judgment.
8/7/80	35	Amended Page two of 8/6/80 Motion.
8/11/80	36	Memorandum and order (RWW) that pltf's motion to alter or amend the judgment, or in the alternative, to stay the judgment is denied.
8/14/80	37	Pltf's reply to defts' brief in opposition to motion to alter or amend judgment or to stay judgment.
9/9/80	38	Pltf's notice of appeal to the Supreme Court of the U.S.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
CIVIL ACTION NO.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME AND STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

COMPLAINT

1. This action is brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, Public Law 91-173 as amended by Public Law 95-164, 91 STAT 1290, ("Act").

2. Jurisdiction is founded upon Section 108 of the Act, 30 U.S.C. § 818.

3. At all relevant times mentioned herein, Waukesha Lime and Stone Company operated a mine subject to the Act in or near Waukesha, Waukesha County, Wisconsin, within the jurisdiction of this Court.

4. On July 10, 1978, pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977, an authorized representative of the Secretary of Labor went to the mine operated by defendants to conduct an inspection of that mine.

5. The authorized representative advised Douglas Dewey of his purpose for being at the mine and requested entry.

6. Defendant, Douglas Dewey, failed and refused to permit the authorized representatives of the Secretary to enter and inspect that mine. Affidavit of Walter C. Brey, Federal Safety and Health Inspector, is attached hereto as Exhibit 1 and made a part hereof.

7. Pursuant to Section 103 of the Act, the Secretary of Labor has a right of entry to defendant's mine.

8. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff respectively prays that the defendant, its agents and employees and all persons in active concert and participation with them be preliminary and permanently enjoined as follows:

1. From refusing to admit authorized representatives of the Secretary to, upon or through defendant's mine;

2. From refusing to permit the inspection of the mine by authorized representatives of the Secretary;

3. From interfering with, hindering, and delaying authorized representatives of the Secretary in carrying out the provisions of the Act; and

For such other relief as the court may deem just and proper.

WILLIAM J. MULLIGAN
United States Attorney

by _____
Assistant U.S. Attorney

_____

MORELL E. MULLINS
Associate Solicitor

_____

PAGE H. JACKSON
Trial Attorney

Attorneys for Secretary of Labor
Office of the Solicitor
Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203
Telephone: (703) 235-1161

Exhibit 1

COUNTY OF DANE
STATE OF WISCONSIN

AUGUST 14, 1978

DIVISION OF MINE HEALTH AND SAFETY

AFFIDAVIT

Walter C. Brey, Mine Safety and Health Administration (MSHA), United States Department of Labor, being duly sworn according to law, deposes and says:

1. I am an authorized representative of the Secretary of Labor, employed by MSHA as a Federal Metal and Nonmetal mine inspector, and assigned to the Madison, Wisconsin field office. In this capacity I conduct inspections of metal and nonmetal mines pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*, Public Law 91-173 as amended by Public Law 95-164 ("Act").

2. I have personal knowledge of the facts and circumstances mentioned herein.

3. On Monday, July 10, 1978 I traveled to the Waukesha Quarry and Mill which is located on highway 164 in or near Waukesha, Waukesha County, Wisconsin for the purpose of conducting a safety and health inspection of the quarry.

4. I arrived at the quarry at approximately 9:05 a.m. and initiated the inspection.

5. After starting the health portion of the inspection, I went to the company office to confer with Douglas Dewey, President, at 10:15 a.m.

6. Mr. Dewey presented an assessment sheet and pointed out that he was very upset over the amount of the assessment levied against the company for past violations.

7. Mr. Dewey then informed me that I would not be allowed to reenter the quarry property to finish the inspection without a search warrant.

8. I left the company property at approximately 10:25 a.m.

WALTER C. BREY

Sworn to and subscribed to before me, a Notary Public, this 18th day of August, 1978.

/s/ _____
Notary Public

My Commission expires December 23, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO.,
WAUKESHA, WISCONSIN, DEFENDANTS.

ANSWER AND AFFIRMATIVE DEFENSE

ANSWER

Now come defendants, Douglas Dewey and Waukesha Lime & Stone Co., by their attorneys, Miller and Niebler S.C., in Answer to plaintiff's Complaint and say:

1. Admit that Douglas Dewey refused to allow Walter C. Brey, as representative of the Secretary of Labor, to enter and inspect the Waukesha Quarry and Mill for the purpose of conducting an investigation on July 10, 1978, demanding that a valid search warrant be obtained prior to inspection as alleged in the Affidavit of Walter C. Brey attached to the plaintiff's Complaint and made a part thereof.

2. Allege that Walter C. Brey was permitted to enter and inspect the Waukesha Quarry and Mill on several previous occasions including April 25, 26 and 27, 1978 and May 8, 1978.

3. Deny that Waukesha Lime & Stone Co.'s operation constitutes a mine within the meaning of the Federal Mine Safety and Health Act of 1977.

4. Deny that plaintiff has no adequate remedy at law and allege in that regard that if in fact the Act applies to defendants, plaintiff's proper remedy is inspection only after first obtaining a valid search warrant.

FIRST AFFIRMATIVE DEFENSE

As and for their First Affirmative Defense against the Complaint, defendants show to the Court as follows:

5. Reallege the allegations contained in Paragraphs 1 and 2 of defendants' Answer.

6. Allege that defendants are not engaged in an industry with a long history of pervasive governmental regulation of the type which would justify a warrantless search.

7. Allege that the Federal Mine Safety and Health Act of 1977 was not intended to apply, and it does not apply, to defendants and industries such as defendants' which lack a long history of pervasive governmental regulation and which does not constitute a "mine" within the meaning of said Act and does not fall under its jurisdiction.

SECOND AFFIRMATIVE DEFENSE

As and for their Second Affirmative Defense against plaintiff's Complaint, defendants show to the Court as follows:

8. Reallege the allegations in Paragraphs 5 and 6 of defendants' First Affirmative Defense.

9. Allege that the application of the provision(s) of the Federal Mine Safety and Health Act of 1977, which authorizes warrantless searches, to defendants violates rights guaranteed to defendants under the Fourth Amendment of the Constitution of the United States.

WHEREFORE, defendants respectfully demand:

1. An Order of this Court directing the Secretary of Labor of the United States Department of Labor and his agents to restrain from enforcing the Federal Mine Safety and Health Act of 1977 against defendants or in the alternative an order directing the Secretary of Labor of the

United States Department of Labor and his agents to obtain a search warrant prior to any investigation or search of defendants' operations at Waukesha Quarry and Mill.

2. An Order of this Court dismissing plaintiff's Complaint, together with costs, disbursements and attorney's fees.

3. Any other relief as this Court may deem just and equitable.

Dated this 2nd day of March, 1979.

MILLER AND NIEBLER S.C.
Attorneys for Defendants

By _____
FREDERIC G. BALDOWSKY

P.O. Address:
Suite 500
611 North Broadway Street
Milwaukee, Wisconsin 53202
Telephone: (414) 271-2700

COUNTY OF DANE
STATE OF WISCONSIN

AFFIDAVIT

Walter C. Brey, Mine Safety and Health Administration (MSHA) United States Department of Labor, being duly sworn according to law, deposes and says:

I am an authorized representative of the Secretary of Labor employed by MSHA as a Federal Metal and Nonmetal mine inspector. I have personal knowledge of the facts and circumstances mentioned herein.

Since 1975 I have been the federal mine inspector responsible for the inspection of metal and nonmetal mines in Waukesha, Kenosha, Racine, Washington, Milwaukee, Ozaukee, Walworth, Rock, Jefferson and Dodge counties in Wisconsin and have inspected all mines located in these counties. There are approximately 110 mines in these counties and all but two are sand and gravel pits or limestone quarries.

Waukesha Lime and Stone Company (hereinafter Waukesha) operates a mill and quarry in or near Waukesha, Waukesha County, Wisconsin. The mill and quarry are located on state highway 164 and are bisected by that road along a north-south axis.

On the west side of the highway Waukesha operates an agricultural lime preparation plant, a scale house, and the west quarry. On the east side of the highway Waukesha operates a primary crusher, a secondary crusher, and a screening section. In addition to limestone Waukesha produces gravel which is removed as a part of the overburden. This material is supplied to an asphalt plant located in the vicinity of the east quarry. This asphalt plant is owned by Mr. Walter Bechthold, Chairman of the Board of Waukesha. Approximately 30 persons are employed by Waukesha at the mill and quarry and numerous contract haulers are present at Waukesha on a daily basis.

On September 16, 1975, Douglas J. Bartell, a foreman at Waukesha, was killed when he was buried in a mixture of gravel and limestone in a hopper at the reclaim tunnel. As a result of a fatal accident investigation which I conducted on September 17, 1975, two notices of violations of mandatory safety standards related to the fatality were issued.

On April 25, 26, and 27, 1978, I conducted a safety and health inspection at Waukesha which resulted in the issuance of twenty-five citations for violations of mandatory safety and health standards. Two of these citations related to the amount of silica-bearing dust to which the employee bagging lime was exposed and the failure [of] Waukesha's management to require the employee to wear a respirator.

The purpose of my attempted inspection of July 10, 1978, was to resurvey the silica-bearing dust levels at the bagging station to determine whether Waukesha had corrected the situation.

On some of my inspection visits I have observed state inspection personnel on the Waukesha mine property. To the best of my knowledge and belief state inspection personnel are continuing to conduct warrantless inspections of the Waukesha quarry and mill.

/s/ _____
WALTER C. BREY

Sworn to and subscribed to before me a Notary Public this 6th day of March, 1979.

/s/ _____
Notary Public

My Commission expires December 23, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

STIPULATION

The plaintiff and defendants in the above-encaptioned matter hereby stipulate to the facts set forth below:

1. On July 10, 1978, at approximately 9:05 A.M., Walter Brey went to the Waukesha Quarry and Mill, as representative of the Secretary of Labor, for the purpose of conducting a mine safety and health inspection.

2. When Mr. Brey went to the office of Mr. Douglas Dewey, President of Waukesha Lime & Stone Co., which operates Waukesha Quarry and Mill, at approximately 10:05 A.M., Mr. Dewey ordered Mr. Brey to leave the premises and demanded that a valid search warrant be obtained prior to inspection.

Dated this 7th day of March, 1979.

Respectfully Submitted,

/s/ _____
PAGE H. JACKSON
Attorney for Plaintiff

MILLER AND NIEBLER S.C.
Attorneys for Defendants

By /s/_____
FREDERIC G. BALDOWSKY

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Walter A. Bechthold

DATE: August 8, 1979

TIME: 10:05 a.m.

PLACE: 517 East Wisconsin Avenue

REPORTER: Brenda L. Woltman

* * * * *

[5] Q At the time you purchased Waukesha Lime & Stone were you aware of the fact that the State was inspecting it for safety?

A Well, I think we had the same inspector come around inspecting our material, our equipment, that was inspecting them, the State.

[23]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Edward H. Bull

DATE: August 7, 1979

TIME: 11:00 a.m.

PLACE: 517 East Wisconsin Avenue, Milwaukee, WI

REPORTER: Brenda L. Woltman

* * * * *

[34] Q Your authority is based upon Chapter 1—is it 101 of the Wisconsin Statutes?

A It is 101.11 of the State Statutes, which deals with the Industrial—Department of Industry & Labor. We like to call it the Industrial Commission if you're as old as I am.

* * * * *

[35] Q And is it your understanding that the statutes that provided for these inspections provided for the inspection of any business in Wisconsin that was subject to Workmen's Compensation Law?

A That's correct.

Q And that would be any employer who had two or more employees?

A In the old days it was three or more, and then somewhere along the line somebody changed it to one. The farmers got caught in six employees, but that was about it. Today almost everybody's under the act.

* * * * *

[37] Q All right. Do I gather that this mining engineer that you referred to who was a State employee from 1919 to 1949 was the only person whose sole responsibility was mining during that period?

A Well, not in the way that's said. His responsibility, yes, was that, but then, like I say, each area of the state had a general safety inspector, and those general safety inspectors would on his request make checks just like our Mr. Sigurdson did on these files.

Q Well, I don't know Mr. Sigurdson, but I gather that one day he could be at a quarry and the next day he could be at the International Harvester foundry in Waukesha?

A That is correct.

Q And the third day he could be at the A & P store in Waukesha?

A That is correct. He was a good man.

Q In other words, his responsibility was anything covered by Chapter 101?

A That is right. And at the request of the various—now, the electrician, we didn't have an electrical [38] engineer like we do today, and we would call up—oh, in the early days it was adjusting the beams of headlights and all kinds of crazy things like that. He could be involved in many things.

* * * * *

[41] Q Is there any agreement such as you had with OSHA with the U.S. Bureau of Mines for inspections?

A I think our agreements have been verbal. I like to think that we work fairly good together.

Q But you're not aware of any formal agreements between the two parties?

A No. I know probably what you have in mind. There was [42] a time when the states were asked to sign agreements. I had a letter from the Governor at one time indicating that we should try to promulgate an agreement with what they called MESA in those days.

And, of course, we reviewed the whole thing with the State of Arizona, which was one of the jewels of this thing. They had the first contract and all this and that with MESA. But then our own people at the Department of Industry & Labor simply indicated there need not—or they didn't want an agreement of that type. So, since then we wandered along without an agreement. It is more or less verbal what we have.

* * * * *

[45] Q I notice that there's a note on Page 1 of Chapter 1 which says, "The following rules are based on rules of Title 30, Mineral Resources, Chapter 1, Bureau of Mines, Department of Interior, published in the Federal Register, Volume 34, July 31, 1969."

A That would be the thing.

Q That would be the date they published it?

A Yes.

Q The date here is 5/1/72. That would be your date?

A That would be our date more or less at that point.

[46] Q Was this thing which became effective in '72 the first time that the Wisconsin Administrative Code had adopted a scheme which followed a federal scheme?

A In mining, yes.

* * * * *

[1]

BRENDA L. WOLTMAN—RPR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Jack E. Delaney
DATE: August 7, 1979
TIME: 1:35 p.m.
PLACE: 517 East Wisconsin Avenue
REPORTER: Brenda L. Woltman

* * * * *

[4] Q Would you just very briefly tell me what happens when you arrive at the mine? I mean, do you go to the mine office and announce the fact that you're going to make an inspection or what is your usual routine?

A Yes. I do.

Q Well—

A I usually contact the mine office, Mr. Dewey there. And the supervisor now is Mr. Hojins, and Mr. Hojins usually accompanies me on the inspection.

Q Do you normally contact a representative of the miners and ask if they would like to come with you?

A No. I don't.

Q When you arrive at the mine office do you tell Mr. Dewey or his representative the particular purpose why [5] you're there, the reason you're there?

A Yes.

Q When I say that, I mean do you say, "I'm here to see whether you obeyed or fixed the violations"?

A Yes.

* * * * *

[9] Q Have there been occasions when you've made [10] inspections when you weren't accompanied by a representative of Mr. Dewey or by Mr. Dewey?

A No.

Q They always accompanied you?

A That's right. Sometimes not the same man will accompany for the whole inspection, maybe one guy for the east quarry and one guy for the shop and one person for the west quarry. It's always his representative comes along.

* * * * *

[12] Q Do you inspect things other than limestone quarries and the explosives?

A Yes. Well, we do limestone, underground, storage in use.

Q When you say "underground," what do you mean, "underground"?

A Underground mines.

Q Do you do underground excavation?

A We did one just recently at the request of OSHA.

Q Do you do tunneling?

A Pardon?

[13] Q Just general tunneling?

A Yeah, underground tunneling right.

* * * * *

Q And if I understand, your testimony was that management at Waukesha Lime has always voluntarily cooperated with you in your inspections. Is that correct?

[14] A Yes. They have.

* * * * *

Q Just for the record so there's no question about this, do you consider Waukesha Lime & Stone to be a safe operation?

A Yes. I do.

* * * * *

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

VS.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO.,
WAUKESHA, WISCONSIN, DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Douglas E. Dewey

DATE: August 8, 1979

PLACE: 517 East Wisconsin Avenue

REPORTER: Brenda L. Woltman

* * * * *

[13] Q Are there any signs on the dust house that say "Do not enter"? Is there anything to physically keep the customer from entering the dust house?

A The building?

Q The building.

A I don't know.

Q You don't know?

A I'm sorry. I don't know. There's not a physical barrier. I can attest to that.

Q From what I understand, no actual instructions are given at the gate, scale house, that the people are not to enter the dust house. Is that correct?

A You're catching us now in the middle of a change that's taking place right now under present regulations. We've just completed school and training, and we're in the process of making changes under the federal law, and we have not at this time installed additional items.

We have instructed our scale—the man at the scale to alert people about leaving their vehicles, et cetera. This has all just been changed. We completed the [14] school of our people last week.

Q So in the future you are going to instruct people to remain in their cars?

A We have to do that, yes.

Q You have to train your employees, but you don't necessarily have to tell the people—

A We have to train the employees to prohibit the people.

Q That's your own training plan, though. Is that correct?

A That will be part of it, yes.

Q But what I'm saying is the federal government didn't say you've got to tell the people to remain in their car. That was something you decided to do. Is that correct?

A No. They said in order to enter the various production areas, people must be trained. In other words, we'd have to school our customers.

* * * * *

[24] Q Are both bagging stations visible from the highway when the doors are open?

A I don't—if you were sitting on the highway, I don't believe you could see either bagger operator from the highway through the doors.

[25] Q Through the doors?

A I don't believe you could see them the way they sit.

Q How about from the railroad tracks?

A No. You wouldn't see them. I think they're shielded by this sheet metal I told you about.

* * * * *

[38] Q And why did you deny him entry?

A I felt it was my right.

Q Did you know why he was there? Did he tell you why he was at the mine or did he tell your superintendent?

A No. He did not tell me why he was there. You're talking at the time—

Q You told him to leave.

A —I asked him to get a search warrant. No. He didn't tell me why he was there at that time.

Q Did you know why he was there, though? I mean, did you assume he was there to see whether the dust had been fixed, the problem had been fixed?

A No. No.

* * * * *

Q You referred a moment ago to an inspection in April of this year by the State?

A That's correct.

Q How did they happen to be there if you know?

A I recall asking the State to come in and inspect us.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO.,
WAUKESHA, WISCONSIN, DEFENDANTS.

STATE OF WISCONSIN
WAUKESHA COUNTY

DOUGLAS DEWEY, being first sworn, says:

1. He is the president of Waukesha Lime & Stone, and individual defendant in this action, and makes this affidavit in opposition to the motion of plaintiff for summary judgment.

2. It is the policy of Waukesha Lime & Stone Company that persons on the company premises, including state and federal investigators, union representatives and representatives of insurance companies, be accompanied by a representative of Waukesha Lime & Stone at all times. Such investigators are not permitted to roam, at will and unaccompanied, around the Waukesha operation. On rare occasions investigators known to Waukesha personnel have been permitted to go to specific locations on the Waukesha premises by themselves for limited purposes of specific investigations. This was the policy of Waukesha on and before July 10, 1978.

3. Customers are permitted in only a small portion of the Waukesha premises, namely the road extending from the scale house to the dust plant where buyers are permitted to pick up products purchased by them. There is a small office in the dust plant where an employee of Waukesha is on duty to assist customers with their orders. Customers are only permitted in the office area of the dust

plant. The area where bag machine operators work is an area where customers are not permitted. To the best of my knowledge, this is the area where any survey of silica-bearing dust levels at the bagging station would be performed. The foregoing has been true throughout the period of my employment at Waukesha.

/s/ _____
DOUGLAS DEWEY

Subscribed and sworn to before me this 30 day of October, 1979.

/s/ _____

Notary Public, State of Wisconsin
My Commission: Is permanent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE DISPUTE

1. The defendant Waukesha Lime & Stone Company (hereinafter Waukesha) operates a limestone quarry and mill in or near Waukesha, Waukesha County, Wisconsin. The defendant Douglas Dewey is employed by Waukesha and serves as president of the company. (Brey affidavit, March 6, 1979; Dewey dep. p. 3).

2. Materials produced by Waukesha at the quarry and mill enter interstate commerce. (Dewey Dep. p. 26).

3. On July 10, 1978, Walter Brey, an authorized representative of the Secretary of Labor, went to Waukesha quarry and mill to conduct a safety and health inspection pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §813 (Supp I, 1977). Mr. Brey's specific purpose for being at Waukesha was to ascertain whether or not Waukesha had abated a prior violation relating to excessive amounts of silica dust levels at the bagging station at the "dust house". (Brey affidavit, March 6, 1978).

4. After placing dust monitoring equipment on the person operating the bagging station Mr. Brey went to the company office to confer with Douglas Dewey. (Brey affidavit, August 11, 1978).

5. Mr. Dewey presented an assessment sheet and pointed out that he was upset over the amount of the assessments levied against the company for past violations. Mr. Dewey then informed Mr. Brey that he could not reenter the quarry or mill without a search warrant. (Brey affidavit, August 11, 1978).

6. Mr. Brey retrieved his equipment and left the defendant's property. (Brey affidavit, August 11, 1978).

7. Waukesha is entirely owned by Payne & Dolan, Incorporated which operates an asphalt plant on property owned by Waukesha immediately adjacent to Waukesha's quarry & mill. (Dewey dep. pp. 4, 5; Bechthold dep. p. 6).

8. Payne & Dolan, Inc. began negotiations for the purchase of Waukesha in April 1967. The acquisition was effective May 1, 1967. (Dewey dep. p. 4, 5).

9. In April 1967 Payne & Dolan, Inc. was aware that Wauskesha was subject to safety and health inspections. (Bechthold dep. p. 5).

10. Waukesha's quarry and mill occupy a tract of land approximately 300 acres in size. This tract is bisected by state highway 164 the Little Fox River and the Milwaukee Road and Soo Line railroads. (Dewey dep. pp. 6, 7).

11. People purchasing limestone from Waukesha can either pick it up or have it delivered oy trucks provided by Waukesha. (Dewey dep. pp. 15, 16).

12. "Pickup customers" desiring bagged limestone stop at the scale house, the main entrance to the quarry and mill, where they place their order and receive a ticket. (Dewey dep. pp. 10, 11).

13. "Pickup customers" then proceed unescorted to the "dust house" where they present the dust house foreman with the ticket. The foreman may be inside the plant. (Dewey dep. pp. 11, 12, 13).

14. "Pickup customers" are not given oral instructions that they may not enter the dust house nor is there a physical barrier or written instructions on the building forbidding entry to the dust house. (Dewey dep. pp. 12, 13, 14).

15. On an average day approximately 100 trucks enter Waukesha's quarry and mill to pick up limestone. (Dewey dep. p. 17).

16. The dust house is located approximately 30 feet off of Highway 164, on the east side of the west quarry. There are no structures, such as a fence between the dust house and the highway. (Dewey dep. p. 7).

17. The dust house is basically an enclosure, consisting of a series of four wood bins and a steel bin enclosed by sheet metal siding. The enclosure has numerous openings and doors, ranging in width from two and one half to ten feet wide. These doors are kept open during hours of operation. (Dewey dep. pp. 23, 24).

18. Immediately adjacent to the east side of the dust house is a railroad spur operated and maintained by the Milwaukee Road railroad. Employees of the railroad come on to Waukesha's property to maintain the spur line. (Dewey dep. pp. 25, 26).

19. Waukesha, pursuant to condition No. 4 of its workmen's compensation insurance policy with Employees Mutual Casualty Company of Des Moines, Iowa, consented to inspections of its mill and quarry by representatives of that company. (Dewey dep. pp. 19, 20 Ex. 1).

20. Waukesha allows inspections by, and in fact has been inspected by the Teamsters Union and the International Union of Operating Engineers which represent approximately 26 of Waukesha's 32 employees. (Dewey dep. pp. 21, 22).

21. Waukesha has also been subject to inspections or investigations at the quarry and mill by the Internal Revenue Service, U.S. Department of the Treasury and the Wisconsin Department of Natural Resources. Dewey dep. p. 18).

22. Waukesha has been subject to safety and health inspections by the State of Wisconsin since approximately 1922. These inspections are for the purpose of obtaining compliance with mandatory standards applicable only to mine and mining. (Bull dep. pp. 5, 6).

23. Records of the State of Wisconsin indicate that state inspectors found "dust" related violations at the "dust house" in July 1953; July 1957; February 1967; and August 1967. (Bull dep. pp. 10, 11 Ex. 2; pp. 15, 16 Ex. 3; pp. 19, 20 Ex. 4; pp. 21, 22 Ex. 5).

24. On August 14, 1967, an atmospheric dust survey was conducted at the "dust house" at Waukesha's quarry and mill by the State of Wisconsin. An atmospheric dust survey involves the use of instruments to measure the atmosphere in the "dust house". (Bull dep. pp. 21, 22, Ex. 5).

25. Wisconsin safety inspectors generally inspect underground mines every two months and surface mines once a year. (Bull dep. p. 29).

26. Wisconsin safety inspectors do not obtain search warrants before making an inspection of mine operations. (Bull dep. p. 29).

27. Jack E. Delaney is employed by the State of Wisconsin, Department of Industry, Labor and Human Relations as a Mine Safety Specialist. (Delaney dep. p. 3).

28. In his capacity as a Mine Safety Specialist, Mr. Delaney has been assigned to inspect Waukesha's quarry and mill for the last six or seven years.

29. Mr. Delaney has never obtained nor has he been asked to obtain a search warrant prior to conducting an inspection at Waukesha. (Delaney dep. p. 11).

30. Waukesha has never restricted Mr. Delaney's access to any portion of the quarry or mill. (Delaney dep. pp. 6, 11; Dewey dep. p. 34).

31. On April 3, 1979, Mr. Delaney conducted an inspection of Waukesha as a result of a request by Douglas Dewey. The inspection required Mr. Delaney to be at the quarry and mill for the entire day. (Delaney dep. p. 7; Dewey dep. pp. 38, 39, 40).

32. During the conduct of that inspection Mr. Delaney was in that area of the "dust house" where the lime is bagged. In his inspection report Mr. Delaney noted six

violations of mandatory standards in the "dust house". (Dewey dep. p. 10).

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Supreme Court of the United States

No. 80-901

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

v.

DOUGLAS DEWEY, ET AL.

APPEAL from the United States District Court for the Eastern District of Wisconsin.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

January 26, 1981

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